STATE OF MICHIGAN

IN THE SUPREME COURT

NATIONAL WINE & SPIRITS, INC.,
NWS MICHIGAN, INC., and
NATIONAL WINE & SPIRITS, L.L.C.,

Plaintiff- Appellants

v

STATE OF MICHIGAN,

Defendant-Appellee

and

MICHIGAN BEER & WINE
WHOLESALERS ASSOCIATION,

Intervening Defendant-Appellee.

Supreme Court No. 126121

Court of Appeals No. 243524

Ingham County Circuit Court No. 02-13-CZ

AMICUS CURIAE BRIEF OF

GENERAL WINE & LIQUOR COMPANY, INC. AND
VINTAGE WINE COMPANY

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STATEMENT CONCERNING APPELLATE JURISDICTION

Appellants' statement of basis of jurisdiction is complete and correct.

STATEMENT OF QUESTIONS PRESENTED

Appellants' statement of questions involved is complete and correct.

INTRODUCTION

General Wine & Liquor, Inc., is a Michigan liquor ADA and a Michigan wine distributor. Appellants' brief, p. 10, names General Wine as a competitor advantaged by the statute, MCL 336.205(3). General Wine files this brief to state its position on the relief sought by Appellants, which would directly affect General Wine's business in Michigan.

Vintage Wine Company is a Michigan wine distributor. Vintage Wine is not a Michigan liquor ADA. Appellant's brief, pp. 22-24 argues against the effectiveness of MCL 336.205(3) in promoting stability in the middle tier of Michigan's wine distribution system. Vintage Wine files this brief to oppose the relief sought by Appellants because this relief would adversely affect the distributor tier and Vintage Wine's business in Michigan.

STATEMENT OF FACTS

General Wine & Liquor Company, Inc., and Vintage Wine Company accept the statements of facts set forth in the briefs of defendants/appellees, whom they support. Additionally, General Wine and Vintage Wine make the following statement of facts, which are germane to this brief:

General Wine's predecessor was incorporated in 1967. It has been under current ownership since 1978. During all those years, General Wine has done business in Michigan as a wine distributor/wholesaler. Its offices are in Highland Park. By 1996, General Wine had built substantial facilities and a fleet of delivery trucks. It also had created a network of relationships with wine suppliers and wine retailers with whom General does business. Then and now, virtually all of the wine distribution appointments held by General Wine are on an exclusive basis, not a dual basis.

In 1996, General Wine became an ADA to assist the state in the privatized distribution of liquor by using its expertise about the Michigan market. General Wine has achieved substantial success as an ADA. Its revenues from that work amounted to $14.9 million in the twelve months ended February, 2005.

Since 1996, General Wine has obtained appointments to distribute over 35 new wine brands. In 2005, these brands accounted for sales of over 31,000 cases of wine. These facts about General Wine are taken from the affidavit of Michael V. Rosch, its General Manager, Wine Division, Exhibit 1 attached.

Vintage Wine started doing business in 1978 as a wine wholesaler. Vintage Wine's first warehouse was located in Mt Clemens. After experiencing steady growth, Vintage Wine currently operates out of a larger facility in Roseville. Vintage Wine has developed a statewide wine distribution system using its own fleet of trucks and relationships with sub-distributors. Vintage Wine has not sought appointment as an ADA.

Many of the distribution rights held by Vintage Wine are the result of appointments that occurred after September, 1996. Vintage Wine is not the sole appointed distributor for all of the brands it distributes, and is therefore "dualled" with a competing distributor for some brands. Vintage Wine is currently "dualled" with an ADA wholesaler for two wine brand portfolios. Vintage Wine has been successful, however, in obtaining sole distribution rights to wine brands after September, 1996. For example, in July, 2001, Vintage Wine was appointed the first and sole distributor of the Yellowtail brand of wines for the entire State of Michigan. Vintage Wine sold 162,518 cases of Yellowtail wines during calendar year 2005. These facts about Vintage Wine are taken from the affidavit of Michael J. Giorgio, its President, Exhibit 2 attached.

The following facts about the appellants are taken from National Wine & Spirits, Inc.,'s Annual Report for Fiscal Year 2005, ended March 31, 2005. It is available at the Securities Exchange Commission and at www.nwscorp.com. Cited excerpts are attached as Exhibit 3.

National Wine & Spirits, Inc. ("NWS"), the first-named plaintiff/appellant in this case, "is a holding company and has no independent assets or operations." Report, p 47. "The Company's revenue, including the wholesale dollar sales for its fee operations, places NWS as the tenth largest wholesaler in the United States, according to industry surveys." Report, p 3.

“None of ten largest United States distributors competes with NWS in Michigan.” Report, p 10.

“Although the terminable written agreements provide NWS with the non-exclusive right to distribute the suppliers’ products in a particular state, in practice the suppliers have generally selected a distributor to be the exclusive distributor of specified products in each state. In each of Indiana and Michigan, NWS is presently acting as the exclusive distributor with respect to virtually all of the products it distributes.” Report, pp 6-7.

“NWS Michigan, Inc. (NWSM) distributes liquor throughout Michigan and National Wine & Spirits, LLC (NWSM-LLC) is a wholesale distributor of non-alcoholic and low proof products throughout Michigan. NWSM distributes spirits products as an Authorized Distribution Agent for the State of Michigan and derives revenue from distribution and brokerage fees. Accordingly, NWSM’s results represent the entire ‘All Other’ segment as described in Note 13.” Note 1 to audited statements, Report, p 39. Note 12 (not Note 13) sets forth “Segment Reporting” of NWS’s revenues and expenses.

In Note 12, NWSM’s Michigan distribution fee revenues are set forth under “All Other.” Report p 55. For three fiscal years, they are:

2003	2004	2005
$22,999,000	$27,045,000	$29,268,000

NWS Michigan’s distribution fees are repeated in a summary appearing at Report p 5.

“NWS is the largest distributor of spirits in Indiana with 59% market share and Michigan with 51% market share.” Report, p 3.

NWS’s company-wide consolidated net income in fiscal 2005 was $5,439,000. Report, p 36, Consolidated Statement of Operations. NWS’s net income from liquor distribution in Michigan was $1,224,000. *Id.* Thus, NWS’s net income from Michigan distribution fees was 22.5% of the consolidated net income of the holding company and all consolidated subsidiaries.

ARGUMENT

SUMMARY OF ARGUMENT

General Wine & Liquor, Inc. and Vintage Wine Company will focus their *amicus* brief on these points:

1. This is not a *Granholm* case. By definition, *all* brands of wine that National Wine & Spirits LLC wants to distribute under a dual appointment already are distributed in Michigan, in interstate commerce. No brand is excluded from Michigan.

2. Plaintiff/appellant National Wine & Spirits, Inc. is a holding company. NWS Michigan, Inc., and National Wine & Spirits LLC are the only two plaintiffs/appellants doing business in Michigan. They are not "out-of-state" companies. NWS Michigan Inc was incorporated in Michigan on 10-21-96. It was appointed an ADA on 12-22-96. Complaint ¶ 3. National Wine & Spirits LLC ("National LLC") was incorporated in Michigan on 12-21-98 and was licensed as a wholesaler on 11-12-99. Complaint ¶ 5. The Complaint is attached as Exhibit 4. NWS Michigan is the sole "member" of National LLC. 1999 Articles Amendment, attached as Exhibit 5.

3. National LLC claims it does not have a book of wine distribution business like General Wine & Liquor, Inc. and Trans-Con Co., identified as National LLC's competitors at p. 10 of its Brief on Appeal. That is because National LLC did not enter the wine market until late 1999, three years after its parent became an ADA, not because its grandparent holding company is chartered in Indiana. When National Wine & Spirits, Inc., saw the opportunity to

enter the Michigan liquor market, it did so. It incorporated NWS Michigan, and NWS Michigan's focus on liquor distribution led to its current 51% share of that market. NWS Michigan built up its liquor business in Michigan for two years before National LLC was incorporated to eventually (one year later) distribute wine. This is a circumstance of corporate history, not protectionism.

4. This case does not challenge nor is it about residency requirements for licensing. No foreign corporation has sought or been denied a license. NWS Michigan and National LLC are chartered in Michigan. They might have been chartered in 1980 or 1990. Had there been no residency requirement for wholesale distributors, the facts would be unchanged. National Wine & Spirits, Inc., had no interest in Michigan until 1996, when the State privatized liquor distribution.

5. MCL 336.205(3) protects equally all wine wholesalers from "dualing" by ADA/wholesalers, regardless when they begin doing business. That protection covered wine distributors doing business in 1996 and it covers those entering the market later, like National LLC. Thus, General Wine may not seek dual appointments for brands National LLC distributes. National LLC may not seek dual appointments for brands General Wine distributes. Both are protected equally from dualing by other ADA/distributors.

6. Section 205(3) is narrowly drawn. It prevents an ADA/wholesaler from seeking "dual" appointment for a brand already sold by another wholesaler but it does not prevent an ADA/wholesaler from seeking and gaining exclusive appointments, the "practice" in the industry.

7. No strict or heightened scrutiny is warranted here. The statute does not regulate or discriminate against interstate commerce. Only a rational basis for the statute is required and the State has supplied it.

I. Standard of Review

General Wine and Vintage Wine agree with appellants that this Court will review this matter de novo.

II. This Case Is Not *Granholm Redux.*

In *Granholm v Heald*, 544 U S 460; 125 S Ct 657; 161 L Ed 2d 796 (2005) the Supreme Court granted certiorari on this question:

> "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment?" 544 US at ___; 125 S Ct at 1895.

That question is not raised by the National Wine appellants, nor is it implicated by their claims. *Granholm* and its companion, *Swedenburg v Kelly*, were brought by wine consumers and wineries. Those plaintiffs demonstrated that Michigan and New York laws prevented out-of-state wineries from making direct retail sales and shipments to in-state customers. Those restrictions on interstate wine commerce offended the dormant Commerce Clause. 544 US at ___; 125 S Ct at 1892.

The appellants here are neither wineries nor consumers. National Wine & Spirits, Inc., is an Indiana holding company that holds no Michigan license. National Wine & Spirits is parent corporation to NWS Michigan, Inc., a Michigan corporation. NWS Michigan is an ADA that was chartered in Michigan in 1996 and began doing business the same year, when ADAs were first authorized in Michigan. In 1998, NWS Michigan formed National Wine & Liquor LLC, a Michigan limited liability company. National LLC is a licensed Michigan wholesale wine distributor.

The appellants are middlemen distributors. They do not assert the interests or claims that were involved in *Granholm*. Nor do they allege or prove that any wine from other countries or states is barred from Michigan markets. To the contrary, National LLC complains because it may not seek "dual" appointments to distribute wine that already reaches Michigan consumers through other distributors. National LLC's true complaint is that the stream of commerce is flowing smoothly, but that more of it should be flowing National LLC's way.

Unlike the *Granholm* and *Swedenburg* cases, no wineries or consumers are before the Court. This is not a *Granholm* case and should not be analyzed as one.

III. Section 205(3) Protects National Wine & Liquor LLC.

Appellants argue that the sole purpose of § 205(3) was to protect Michigan wholesalers doing business in 1996. Plain reading of the statute belies that claim. The statute forbids an ADA to own interests in suppliers of spirits or in retailers. It also limits an ADA's right to distribute wine - it precludes dualing by any ADA/wholesaler, and thereby protects all wine wholesalers, regardless when they begin doing business.

Section 205(3) did not freeze the Michigan wine business in 1996 positions, nor is its protection limited to wine distributors who were doing business then. The statute protects every wholesaler, including National LLC, from dualing by ADAs. General Wine and TransCon, now both ADA/wholesalers, may not seek dual appointments for the brands distributed by National LLC. Thus, the statute protects *all* wholesale distributors in Michigan from dualing by ADA/wholesalers. All are protected equally.

IV. National LLC's 1999 Market Entry Did Not Beget A Burden On Commerce.

National Wine & Liquor LLC was incorporated in Michigan in 1998 and was licensed in 1999 as a wholesale wine distributor. Its sole member is NWS Michigan. Because NWS Michigan is an ADA, National LLC may not seek appointments as a second distributor for wines already distributed by another wholesaler in an area, a so-called "dual" appointment. That is the situation National LLC faced in 1999, when it began to do business as a Michigan wholesale distributor. Any company entering the market in 1999 faced the same prohibition, if it was affiliated with an ADA. There was no burden on commerce before National LLC became a wholesaler, and there is none now.

Arguing that its inability to distribute wine already distributed by others somehow burdens interstate commerce, National LLC points to General Wine and to Trans-Con, both Michigan entities, and both ADAs like NWS Michigan. As the statute makes clear, however, General Wine and Trans-Con may not accept dual appointments to distribute brands of wine in areas where the producer or importer already has appointed a wholesaler for that brand, and that prohibition protects National LLC, too.

National LLC counters that, in 1996, before they became ADAs, General Wine and Trans-Con already were wholesale distributors for some brands, in some areas. The Legislature permitted them to fulfill their appointments in those areas, even if the appointing winery had another wholesaler in that same territory or later appointed one.[1] It is this feature of the statute, this "grandfather clause," that National LLC argues is an impermissible burden on interstate commerce under the dormant Commerce Clause.

National LLC claims that, because it doesn't have some grandfathered distribution contracts, nobody should have them. But National misses the point, confusing its own interest in competing in Michigan with the interest of the public in the free flow of commerce over Michigan's borders.

V. The Art Of Missing The Point: The Commerce Clause Protects The Interstate Wine Market, Not A Particular In-State Wine Distributor.

G. K. Chesterton observed that: "Missing the point is a very fine art."[2] National's ability to miss the point was demonstrated in *NWS Michigan, Inc v General Wine & Liquor Co, Inc,* 58 Fed Appx 127; 2003 US App LEXIS 2243 (CA 6 2003, unpub.)(copy attached as Exhibit 6). We bring the case to this Court's attention because it involves the same parties and similar complaints, not as precedent. In that case, NWS Michigan, the ADA, claimed that General Wine's grandfathered distribution rights violated the Clayton Act, because delivering liquor and wine from one truck allowed General to give discounts NWS Michigan could not match.

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[1] It is worth noting that National LLC and General Wine both have "virtually all" of their relationships in exclusive distribution arrangements. The statute says nothing about those arrangements.

[2] Chesterton's essay, "The Art of Missing the Point" is in the collection 'Utopia of Usurers' (1917), Vol. 5 of the Collected Works of Chesterton and is available at http://www.dur.ac.uk/martin.ward/gkc/books/uusry11.txt (*sic*).

District Judge Quist dismissed the case for failure to plead predatory pricing, a Clayton Act prerequisite. *NWS Michigan, Inc v General Wine & Liquor Co, Inc,* 2001 US Dist LEXIS 7852 (WD Mich 2001, unpub) (copy attached as Exhibit 7). In an opinion by Senior Judge Ryan, the Sixth Circuit affirmed:

> "Antitrust injury is more than mere economic injury, since 'the purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.' *Spectrum Sports, Inc. v. McQuillan*, 506 US 447, 458; 122 L Ed 2d 247; 113 S Ct 884 (1993)." 127 Fed Appx at 129.

That observation is the problem with this case, in a nutshell. The Commerce Clause protects commerce, not commercial enterprises. In *Granholm*, the Supreme Court invalidated the Michigan and New York barrier laws because: "Laws of the type at issue in the instant cases contradict these principles. They deprive citizens of their right to have access to the markets of other States on equal terms." 544 U S at ___; 125 S Ct at 1896. No such deprivation exists here.

The Court of Appeals recognized this flaw in appellants' position:

> "The Commerce Clause 'protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.'" (Opinion p 8, 153a, citing and quoting *Exxon v Governor of Maryland*, 437 U S 117, 127-128; 98 S Ct 2207; 57 L Ed 2d 91 (1978).

VI. Appellants' Cases Are Inapposite.

Appellants argue that § 205(3) "directly regulates or discriminates against interstate commerce" or "favors in-state economic interests over out-of-state interests." In such circumstances, "we have generally struck down the statute without further inquiry." *Granholm,* *supra*, 544 U S at ___; 125 S Ct at 1904, citing and quoting from *Brown-Forman Distillers Corp v New York State Liquor Authority*, 476 U S 573, 579; 106 S Ct 2080; 90 L Ed 2d 552 (1986).

Granholm and the cases it cites do not fit the facts of this case.

Granholm involved a "direct discrimination" against interstate commerce – out of state suppliers of wine were prohibited from shipping into Michigan and New York. There is no prohibition of wine shipment here.

In *Brown-Forman*, New York directly regulated interstate commerce – it required future price posting on a "most favored state" basis that prevented liquor suppliers from reacting to competitive conditions by adjusting prices *in other states* during the posted pricing period. Sec. 205(3) has no effect on suppliers' activities in other states.

Bacchus Imports v Dias, 468 U S 263; 104 S Ct 552; 82 L Ed 2d 200 (1984) struck down "an excise tax enacted by Hawaii that exempted certain alcoholic beverages produced in that State." *Granholm, supra*, 544 U S at ___; 125 S Ct at 1904. There is no tax involved here and no discrimination against products of other states.

In addition to *Granholm, et al*, appellants cite *Lewis v BT Investment Managers, Inc*, 447 U S 27, 42; 100 S Ct 2009; 64 L Ed 2d 702 (1980) in support of the argument that Sec. 205(3) violates the Commerce Clause by discriminating against out of state businesses. In *Lewis*, Florida's banking regulations prohibited investment companies from doing business in Florida if their parent company was chartered in another state. In this case, NWS has a parent chartered in Indiana, but is doing business in the State of Michigan.

Appellants also cite *Raymond Motor Transp, Inc v Rice*, 434 U S 429; 98 S Ct 787; 54 L Ed 2d 664 (1978) and *Kassel v Consolidated Freightways Corp*, 450 U S 662; 101 S Ct 1309; 67 L Ed 2d 580 (1981) to support the argument that "[i]f the Commerce Clause can be used to invalidate a law that puts restrictions on interstate truckers, it can also ban a statute that puts limits on an out-of-state company that distributes alcoholic beverages." Appellants' brief p 33. In *Raymond Motor* and *Kassel*, Wisconsin and Iowa prohibited certain sized tractor trailer trucks from transporting goods across state lines. NWS is not an out-of-state supplier, nor does it transport into the State of Michigan the products it distributes within the state. NWS receives goods transported into Michigan at its warehouse and distributes them to intrastate customers.

Appellants try to wrap themselves in the protections of these cases by continual reference to National LLC as an "out-of-state wholesaler." Of course, it is no such thing.[3] It is a Michigan wholesaler. Its real complaint is that it didn't commence business until after 1996. Appellants point to no out-of-state producer whose prices are regulated by § 205(3). There is no California or Virginia winery whose wines are barred from Michigan. There is no tax levied on foreign wine but exempted for Michigan brands. National LLC is not an interstate carrier. Those cases have no application here.

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[3] Even if wholesaler residency rules were under attack here, the *Granholm* court stated clearly that such requirements are valid: " 'We have previously recognized that the three-tier system itself is unquestionably legitimate.' *North Dakota v United States*, 495 U S [423] at 432; 110 S Ct 1986; 109 L Ed 2d 420 (1990). See also *id.*, at 447 . . . (Scalia, J., concurring in judgment) ('The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler')." *Granholm, supra*, 544 U S at ___; 125 S Ct at 1904.

VII. *Nordlinger v Hahn* Provides Helpful Analysis Here.

National LLC's arguments are akin to those rejected in *Nordlinger v Hahn*, 505 U S 1; 112 S Ct 2326; 120 L Ed 2d 1 (1992), the California "Prop 13" case where plaintiff asserted the hypothetical rights of out of state travelers. Proposition 13 amended the California Constitution to limit increases in property taxes while a home remained in one owner's hands. Relying on the federal Constitution, Nordlinger attacked Prop 13 because the home she bought was re-assessed and taxed five times as much as identical homes in the same neighborhood. 505 U S at 6. Nordlinger claimed that she was denied equal protection by this discrepant treatment.

A. Appellants may not assert other persons' rights.

Nordlinger argued that her claim deserved heightened scrutiny because Prop 13 infringed on the constitutional right to travel from outside the state. She pointed out an exemption from re-appraisal for senior citizens who sold one and bought another California property, and another for parent-child transfers, claiming that those were discriminatory classifications "directly on the basis of California residency." The Supreme Court ruled:

> "But the complaint does not allege that petitioner herself has been impeded from traveling or from settling in California because, as has been noted, prior to purchasing her home, petitioner lived in an apartment in Los Angeles. This Court's prudential standing principles impose a 'general prohibition on a litigant's raising another person's legal rights.' * * * Petitioner has not identified any obstacle preventing others who wish to travel or settle in California from asserting claims on their own behalf, nor has she shown any special relationship with those whose rights she seeks to assert, such that we might overlook this prudential limitation. * * * Accordingly, petitioner may not assert the constitutional right to travel as a basis for heightened review." 505 US at 10-11. Citations omitted.

At oral argument on the application for leave, National LLC's counsel explained that National LLC does not challenge any Michigan residency requirement "[b]ecause we're here operating now. We have met the residency requirement and we still got (*sic*) the same problem." Tr p 7. National's tortured attempt to read "Michigan domiciliary" into the statute makes one wonder whether National does or doesn't assail residency. Brief on Appeal p 18. But no foreign corporation has presented itself for a license and been turned away. "We have met the residency requirement." National LLC is a Michigan corporation, regardless how many times it calls itself an "out-of-state distributor." National LLC may not assert the hypothetical claims of "foreign" corporations because it is not foreign.

B. Economic classification preserving a reliance interest is valid under a "rational basis" test.

The *Nordlinger* Court applied a "rational basis" test and upheld Prop 13. In particular, the Court pointed out that the plaintiff would enjoy the protections of Prop 13 from the day she bought her home, just as a prior owner would. "Petitioner's true complaint is that the State has denied her – a new owner – the benefit of the same assessment value that her neighbors – older owners – enjoy." 505 US at 12. That "true complaint" is very like National's claim that it did not have established distribution appointments when § 205(3) was enacted. But, National LLC has had the protection of § 205(3) since the day it entered the market.

The *Nordlinger* Court also enunciated a "rational" purpose for Prop 13 that has application here:

> "[T]he State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an

existing owner. The State may deny a new owner at the point of purchase the right to 'lock in' to the same assessed value as is enjoyed by an existing owner of comparable property, because an existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner at the point of purchase." 505 US at 12-13.

It requires little editing to make this ruling fit the present case. New applicants for wholesale licenses have no reliance expectations in longstanding distribution appointments. Existing licensees do. That is sufficient rationale for the grandfather rights preserved by § 205(3). "Our standard formulation has been: 'Where . . . there are plausible reasons for [the legislature's] action, our inquiry is at an end." *Montana v Egelhoff*, 518 U S 37, 49, n 3; 116 S Ct 2013; 135 L Ed 2d 361 (1996) (Scalia, J.)[4]

The Court of Appeals observed correctly that "the focus of the statute is on ADA/wholesalers dualing, not on allowing wholesalers to become ADAs or vice versa." Opinion, p. 6, 151a.

> "[B]ecause some ADA/wholesalers already had dualing agreements, defendant did not take away their pre-existing right to dual. It was necessary for the Legislature to insert a date prior to the date the statute was effective because if it had not ADAs and wholesalers would have had a window of time in which to obtain licenses and/or dualing agreements. In other words, it would have allowed circumstances to be altered beyond the status quo." *Id.*

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[4] Justice Scalia observed in his opinion for the court, , that the "plausible reasons" that support legislation need not even be those argued by the defendant state's counsel, but may be any plausible reasons, because "[w]e do not know why the constitutionality of Montana's enactment should be subject to the condition subsequent that its lawyers be able to guess a policy justification that satisfies this Court." *Montana, supra*, 518 U S at 49, n 3 (1996).

C. Grandfathered rights are constitutionally valid.

The Supreme Court has made similar rulings upholding statutory "grandfather" clauses in numerous cases. In *Nordlinger*, the Court reviewed them:

> "This Court previously has acknowledged that classifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws. 'The protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification. . . .' (internal quotations omitted). *Heckler* v. *Mathews*, 465 US 728, 746; 79 L Ed 2d 646; 104 S Ct 1387 (1984). For example, in *Kadrmas* v. *Dickinson Public Schools*, 487 US 450; 101 L Ed 2d 399; 108 S Ct 2481 (1988), the Court determined that a prohibition on user fees for bus service in 'reorganized' school districts but not in 'nonreorganized' school districts does not violate the Equal Protection Clause, because 'the legislature could conceivably have believed that such a policy would serve the legitimate purpose of fulfilling the reasonable expectations of those residing in districts with free busing arrangements imposed by reorganization plans.' *Id.*, at 465. Similarly, in *United States Railroad Retirement Bd.* v. *Fritz*, [449 US 166; 101 S Ct 453; 66 L Ed 2d 368 (1980)] *supra*, the Court determined that a denial of dual 'windfall' retirement benefits to some railroad workers but not others did not violate the Equal Protection Clause, because 'Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits.' 449 US 166, 178. Finally, in *New Orleans* v. *Dukes,* [427 US 297; 96 S Ct 2513; 49 L Ed 2d 511] *supra*, the Court determined that an ordinance banning certain street-vendor operations, but grandfathering existing vendors who had been in operation for more than eight years, did not violate the Equal Protection Clause because the 'city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation.' 427 US at 305 n 5." 505 U S at 13-14.

National LLC urged at oral argument that the crux of its claim was §205(3)'s distinction between wholesalers in business on the "grandfather" date and those who were not, if they later became ADAs. But, counsel acknowledged, the statute imposes the same rules on persons who became ADA/wholesalers in 1996, and on persons who did so in later years. Whether new company or old, out-of-state or in-state, any ADA is subject to the prohibition on dual wine distribution appointments. Tr. pp. 3, 5. Most important, as in *Nordlinger*, anyone getting into the wholesale wine business will receive equally the statute's protection, from that day forward.

National LLC argues that no foreign corporation could have had any distribution appointments on September 24, 1996, because the Act forbade licensing for distribution by any but persons resident in Michigan.[5] But National LLC didn't attempt to become a wholesale distributor until three years later, and was licensed then. Michigan has many companies, domestic and foreign, that were not licensed wholesalers in 1996. They may apply for wholesale distribution licenses. They will then be protected by the anti-dualing statute, while themselves being permitted to accept dual appointments. They may apply also for appointment as ADAs. They will then be subject to the anti-dualing rule, just as National LLC is. No discrimination exists.

In 1996, the Legislature decided to allow existing wine distributors to "dual" -- but only where they already did business -- even if they became ADAs. The Legislature also protected all wholesalers from dualing by ADA/wholesalers in new territories and for new brands. As in

[5] In fact, § 601(4) requires that a corporate licensee or applicant show that *all shareholders* have been resident for a year. A Delaware corporation registered in Michigan could satisfy that condition. By 1998, NWS Michigan had been resident for two years. It is the sole member of National LLC. (Amended articles, attached.) This likely explains why NWS LLC got its license 10 months after incorporation.

Nordlinger, it was rational to extend the protection of the statute on a "going forward" basis to new entrants, but it is not required that they be put on an equal footing with established owners.

That is all that the Michigan Court of Appeals held in *Hertel v Racing Comm'r*, 68 Mich App 191; 242 NW2d 256 (1976). The Legislature created a new benefit for counties that contained racetracks and counties adjacent to them. A portion of the tax on wagers could be paid to any such county that had a stadium authority. But, the Legislature put a "created by" limit on the benefit that limited it to Oakland County and the Pontiac Silverdome. The Court of Appeals ruled that the class of future beneficiaries could not be so limited. *Hertel* involved no "reliance interest" based on past conduct or business relationships, no past reliance on a tax assessment practice. It concerned only a future benefit.[6]

As the Supreme Court observed in *Fritz, supra*, "[b]ecause Congress could have eliminated windfall benefits for all classes of employees, it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out those benefits." 449 U S at 177.

VIII. The Legislature May Set Limits On Competition.

Wine distributors who do not become liquor ADAs may seek and accept dual appointments for any areas, regardless whether other wine distributors are at work there. Only

ADA/distributors are forbidden to dual. This is a legislative compromise like the compromise validated in *Fritz, supra*. The Legislature might have erected a complete barrier between distributors of liquor and wine, as appellants suggest would be "elegant." Appellants' brief p. 25. Or, the Legislature might have permitted dualing without limit. Choices like that are uniquely suited to the Legislature, which is charged with balancing competing interests.

" 'The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific.'" *Fritz*, *supra*, 49 U S at 175, citing and quoting from *Metropolis Theatre Co v City of Chicago,* 228 U S 61, 68-70; S Ct 441; 57 L Ed 730 (1913).

In *Wiles v Liquor Control Comm'n*, 59 Mich App 321; 229 NW2d 434 (1975), an applicant was denied a license upgrade to sell liquor for on-premise consumption because it was within 500 feet of a church. The applicant sought mandamus to compel issuance of the upgrade, claiming that the 500 foot rule denied it equal protection because (1) hotels were not covered by it and (2) SDD licensees (sales for off-premises consumption) did not have a 500 foot rule. The Ingham Circuit Court found that there was no rational basis for distinguishing among the kinds of licensees and ruled that the statute was unconstitutional.

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[6] *Hertel* also is difficult to explain in this particular: the plaintiffs in that case were taxpayers, bettors and breeders who attacked an increase in the tax on wagers and the diversion of a portion of it to stadium purposes. They sought "to have the state funding of the Pontiac Stadium cut off." 68 Mich App at 194. The Court of Appeals denied relief to them. 68 Mich App at 201. However, without much explanation as to why it went on to reach the question, the Court ruled that the limitation to one stadium was unconstitutional. There is no explanation why the Court would deny relief to plaintiffs but then enter an order that effectively modified the statute.

The Court of Appeals reversed because the Legislature could rationally distinguish between hotels and package stores, on one hand, and taverns, on the other. "Questions concerning what combination of dangers or benefits would justify distinguishing hotels from taverns or whether an open tavern has a greater potential for interfering with churches than an SDM are not for courts to resolve so long as there are facts that one could rationally rely on to resolve them against the tavern." 59 Mich App at 325.

In *Florentine Ristorante, Inc v Grandville,* 88 Mich App 614; 278 NW2d 694 (1979) a restaurant owner challenged a city ordinance prohibiting sales of liquor on Sundays for consumption on-premise, but allowing Sunday sales after noon for consumption off-premise. The restaurant owner sought a declaratory judgment that the ordinance denied it equal protection because the ordinance differentiated between on-premise and off-premise sales without a rational relationship to a legitimate city purpose. The trial court found that banning on-premise alcohol sales on Sunday furthered a legitimate public safety interest.

The Court of Appeals affirmed, adopting the trial court's reasoning that there existed substantial public safety distinctions between on-premise and off-premise sales. For example, on-premise drinking would likely lead to the drinker traveling public streets to get home, while a person who buys to drink off the premises is more likely already home when he consumes his purchase. The Court of Appeals validated the city's classification of on-premise and off-premise sellers: "Equal protection principles do not prevent a reasonable classification by legislative enactment if that enactment applies alike to all persons within such class and reasonable grounds exist for making the distinction between those who fall within such class and those who do not." 88 Mich App at 624.

This statute involves similar legislative gradations and choices.

IX. Appellants Ask The Court To Legislate.

National LLC asks the Court to revise Michigan's wine distribution statute and system. In its Complaint in Ingham Circuit Court, National LLC asked, simply, that the court "declare that Section 205(3) of the 1998 Code is unconstitutional and of no force and effect." National LLC's motion for summary disposition repeated that request. Presumably, that relief would allow any wholesale distributor to be a dual distributor, anywhere, even if affiliated with an ADA.

At the Court of Appeals, National LLC continued to request "peremptory" declaration that § 205(3) is unconstitutional. National Brief at 49. National argued, however, that "[i]f protection of wine wholesalers and the wholesale market had truly been the goal of § 205(3), this goal could have been much more effectively accomplished by just prohibiting ADAs from becoming wine wholesalers." *Id.* at 26. That is different. If that result were reached, no ADA could distribute wine at all, much less dual. National claims that this alternative would have been "simple and elegant." Brief on Appeal, p 25.

A barrier between liquor distributors and wine distributors might strike some as simple, but it is not elegant. It would have been Draconian, forcing every Michigan wine wholesaler to choose between continuing its existing business or abandoning it to become an ADA. Evidently, the Legislature did not want to preclude Michigan wine distributors from assisting the State as ADAs and take the chance that only a new entrant could become an ADA. Nor would it be appropriate for the Court to order such a thing -- it is so far from the sense of the statute as written that it would amount to new legislation.

Does National want every ADA wine wholesaler to be able to accept dual appointments, for any brand or territory? It doesn't say so and a plain reading of the statute makes it clear that the Legislature did not want that, either. What is left? The only remaining solution would be somehow to equip National with a substantial book of wine distribution rights that it didn't earn by years of hard work and investment. The Legislature made the choice and that is where such choices must repose.

In an effort to bolster its case, National LLC submitted to the circuit court an affidavit of Patrick Anderson, a self-employed economist. National Brief on Appeal to Court of Appeals, Ex. 12. Anderson argued that § 205 "encourages predatory pricing" and "increases the incentives for smuggling, black market and grey market importation and distribution of spirits." *Id.*, p 13. Anderson could be right. He could be wrong. But such claims are for the Legislature and involve policy issues only it may address.[7]

National Wine is free to seek amendment of the statute and its history demonstrates that the Legislature will attend to concerns about the statute's reach.

Sec. 205 was originally enacted in 1996, as MCL 463.3a(3). 1996 PA 440. It was re-enacted without change by 1998 PA 58 as MCL 336.205(3). Only five years after original

[7] Astoundingly, National proffers an "updated" version of Anderson's essay. App. 154a et seq. In it, Anderson says that from 1999 to 2004, new brands were introduced amounting to 12% of the market. One new brand, "Yellow Tail," now accounts for 2.4% of the entire market. That sounds like new brand opportunity for new distributors. Indeed, for Vintage Wine, it has been. National LLC could have competed for that brand.

enactment, the Legislature made substantial changes in § 205(3). 2001 PA 274. For example, the prohibition on appointment as a dual distributor in an "area," a nebulous term, was changed to confine the prohibition to "a county or part of a county for which another wholesaler has been appointed to sell that brand." It added the requirement that the existing wholesaler have been "actively selling" the brand, further narrowing the definition of dualing. Additionally, the Legislature permitted an ADA/wholesaler to acquire grandfathered dual appointments by "acquisition, purchase or merger."

Ease of market entry; acquisition of dual appointments; the geographic scope and description of the limits wrought by § 205(3): these are legislative concerns.

CONCLUSION

National Wine & Spirits never wanted to enter the Michigan market before 1996. So, like many other Michigan companies, National LLC did not have a wholesale license nor appointments to distribute wine in Michigan in 1996 (indeed, it did not exist until 1998). National LLC is treated no differently under the law than other companies in similar circumstances. No product is barred from Michigan by § 205(3). No commerce in wine is impeded, burdened or regulated. Michigan's law conforms with the equal protection guaranties of the Constitution. The Court of Appeals should be affirmed.

Respectfully submitted,

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